Supreme Court, U.S.
FILED
AUG 15 1994
OFFICE OF THE CLERK

(3)

No. 93-1690

In The

Supreme Court of the United States

October Term, 1994

JEFFERY D. SCOTT,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Alaska

MEMORANDUM IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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8 pp

TABLE OF CONTENTS

Page

SUMMARY 1

ARGUMENT 2

I. Scott is asking this Court to Consider Executive Action that took place on October 15, 1993 and which was presented to the Alaska Supreme Court as Additional Regulatory Authority in Scott's Petition for Hearing Dated December 9, 1993 2

II. The Record is Clear that the Trial Court ruled Against Scott pursuant to Native Village of Stevens that the Native Village of Northway is not an Indian Tribe, as a matter of law 4

III. The Native Village of Northway Retains its Inherent Tribal Sovereign Authority to Manage Hunting in Indian Country 8

CONCLUSION 10

APPENDICES

A Tape of Evidentiary Hearing dated October 2, 1992 in Trial Court A-1

B Scott's Motion to Dismiss B-1

C State's Opposition to Motion to Dismiss C-1

D Scott's Reply to State's Opposition D-1

TABLE OF AUTHORITIES

Page

CASES

Amoco Production Co. v. Gambell, 480 U.S. 531, 94 L.Ed.2d 542, 107 S.Ct. 1396 (1987) 9

Blatchford v. Native Village of Noatak and Circle Village, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)..... 9

Chilkat Indian Village v. Johnson, No. J84-024 Civ. (D. Alaska Oct. 9, 1990)..... 9

Cohen v. United States, 378 F.2d 751 (9th Cir.), *cert. den.*, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed.2d 215 (1967)..... 4

Decoteau v. District County Court, 420 U.S. 425 (1975)..... 9

Hackla v. Atxam Corp., 753 P.2d 1144 (Alaska 1988)..... 9

Hensel v. State, 604 P.2d 222 (Alaska 1979)..... 3

Kimball v. Callahan, 590 F.2d 768 (9th Cir.), *cert. den.*, 444 U.S. 826 (1979)..... 9

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)..... 9

Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988)..... 1, 4, 8

Native Village of Tyonek v. Puckett, 890 F.2d 1054 (9th Cir. 1989)..... 9

Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991)..... 1, 8

State ex rel Nepstad v. Danielson, 427 P.2d 689 (Mont. 1967)..... 4

United States v. Atlantic Richfield Co., 612 F.2d 1132 (1980)..... 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Sanga, 967 F.2d 1332 (9th Cir. 1992) . . . 2, 4

United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941) 9

STATUTES AND RULES

Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, (to be codified pursuant to 25 C.F.R. Part 83, Oct. 15, 1993) 2

43 U.S.C. Sec. 1601 *et seq.* (Alaska Native Claims Settlement Act) 9

25 U.S.C. Sec. 450a(b) 9

25 U.S.C. Sec. 450b(e) 9

25 U.S.C. Sec. 1901 *et seq* 9

25 U.S.C. Sec. 1451 9

25 U.S.C. Sec. 1452(c) 9

26 U.S.C. Sec. 7701(40) 9

26 U.S.C. Sec. 7871 9

31 U.S.C. Sec. 7102 9

Federal Rule of Appellate Procedure 10 3

Alaska Criminal Rule of Procedure 35.1(a)(2) 2, 3

Alaska Criminal Rule of Procedure 35.1(b) 3

MISCELLANEOUS

Getches & Wilkinson, Federal Indian Law, pg. 778 (West 1986) 9

SUMMARY

The State's Opposition to Mr. Scott's Petition for Certiorari is satiated with misrepresentations which he is now forced to correct by means of this Reply.[1] The State's arguments in its opposition are founded primarily on its contention that the trial court judge ruled against Scott based upon Scott's failure to introduce sufficient factual evidence at the evidentiary hearing on October 2, 1992 on Scott's motion. In truth, the lower court judge was clear on the record that his decision was based, as a matter of law, upon *Native Village of Stevens v. Alaska Management & Planning,* 757 P.2d 32 (Alaska 1988) and that he was not making any factual findings in reaching his conclusion. It was not necessary to make any factual findings. As proof of the lower court's statements a copy of the tape from the trial court evidentiary hearing is enclosed as Appendix A.

The State acknowledges the irreconcilable conflict of law between the Ninth Circuit in *Native Village of Venetie I.R.A. Council v. Alaska,* 944 F.2d 548 (9th Cir. 1991) and the Alaska Supreme Court in this case. The State does not suggest that this entrenched conflict can be resolved in any way other than review by this Court. Instead, the State avoids resolution of this basic conflict in law by raising a series of issues that were not addressed by the lower trial court nor were raised by Scott in this Petition for Certiorari.

Also, Scott's presentation of additional authority to this Court regarding Department of Interior executive action should be allowed, despite the State's flawed claim that it

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[1] The State's errors can perhaps be forgiven in light of the fact that this case was just recently assigned to Mr. Rosenstein in Anchorage with the State Office of Special Prosecutions and Appeals. Mr. Rosenstein did not participate in any capacity in any of the lower court proceedings. He was not present at the evidentiary hearing in Scott's case. On May 17, 1994 the State filed a letter with this Court stating that they waived the right to file an opposition brief to Mr. Scott's Petition for Certiorari. On June 7, 1994 this Court sent a letter back to the State requesting that a response be filed to this Petition, even though the State had waived the right to file a response. The State's case was then assigned to Mr. Rosenstein to write the response brief in light of this Court's request.

should be stricken. This additional authority was not available for the trial court's perusal because the action occurred on October 15, 1993. This information was supplied, though, to the Alaska Supreme Court in Scott's Petition for Hearing dated December 9, 1993.

Finally, the State's claim that the recognition of Native sovereignty in this case would create a regulatory vacuum is plainly wrong. As Scott has explained repeatedly from the start of these proceedings, Northway tribal law governs the hunting and fishing activities of persons on this particular piece of Indian Country. The factual and legal nature of Northway's tribal law was never explored at the evidentiary hearing because the court did not consider it necessary to reach those issues in light of his preliminary legal decision.

ARGUMENT

I. SCOTT IS ASKING THIS COURT TO CONSIDER EXECUTIVE ACTION THAT TOOK PLACE ON OCTOBER 15, 1993 AND WHICH WAS PRESENTED TO THE ALASKA SUPREME COURT AS ADDITIONAL AUTHORITY IN SCOTT'S PETITION FOR HEARING DATED DECEMBER 9, 1993.

The States claims that this Court should not consider the Department of Interior's executive action (a federal regulation) dated October 15, 1993 which listed federally acknowledged Indian tribes (including the Native Village of Northway). *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,* (to be codified pursuant to 25 C.F.R. Part 83. Oct. 15, 1993). The State feels that this federal regulation was a "document" or "exhibit" which was not filed in the trial court and is therefore inadmissible. It cites *United States v. Sanga* as authority for this position. The State also claims that Alaska Rules of Criminal Procedure 35.1(a)(2) is instead the proper procedural forum for Scott to introduce this new regulation.

The State is clearly wrong. *United States v. Sanga,* 967 F.2d 1332, 1336 (9th Cir. 1992) concerned factual exhibits

and documents (evidence) introduced at the appellate level that were not previously admitted in the trial court. Scott's introduction of a copy of the federal regulation was first made in connection with his Petition for Hearing dated December 9, 1993 in front of the Alaska Supreme Court. Simply attaching a copy of a federal regulation as an exhibit to an appellate pleading does not prohibit the re-introduction of this federal regulation as part of Scott's Petition for Certiorari. The State should not be able to argue that Scott is prohibited from providing additional legal authority on appeal. Federal Rule of Appellate Procedure (FRAP) 10 concerns the *evidentiary record* on appeal and not the citation of additional legal authority.

Finally, the State claims that Alaska Criminal Rule of Procedure 35.1(a)(2) is instead the proper avenue to present this federal regulation. Rule 35.1(a) is a post-conviction procedure available to criminal defendants and is normally used when there is newly discovered evidence subsequent to the trial and conviction. *Hensel v. State,* 604 P.2d 222 (Alaska 1979). 35.1(a)(2) governs the jurisdiction of the trial court to impose sentence. Here, Scott was convicted before the trial court after he entered a plea of no contest to the charge. The plea was only entered upon the condition that Scott be allowed to reserve the legal issues he contested in his motions in order to appeal these issues to a higher court.

Rule 35.1 is also clear in stating that this remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Rule 35.1(b).

It is clear that contrary to the State's claim, Rule 35.1(a)(2) does not provide a remedy to Scott on the legal issues now before this Court if his Petition is denied. The provisions of this rule are very narrow and the legal issues he raises on appeal have already been raised to the trial court and denied.

The State does not argue that a party is prohibited from citing new legal authority at the appellate level which was not cited at the trial court level. The State has done this itself by

citing new legal authority at this level not cited at the trial court.[2]

II. THE RECORD IS CLEAR THAT THE TRIAL COURT RULED AGAINST SCOTT PURSUANT TO *NATIVE VILLAGE OF STEVENS* THAT THE NATIVE VILLAGE OF NORTHWAY IS NOT AN INDIAN TRIBE, AS A MATTER OF LAW.

The State claims that the trial court may have ruled differently for Scott if he had produced sufficient factual evidence at the evidentiary hearing. The State also erroneously asserts that Scott presented no evidence that the Native Village of Northway is a sovereign Indian tribe. Neither of these statements are true.

It is clear from the record from the October 2, 1992 evidentiary hearing that the trial court instead assumed the truth of all of the facts asserted by Scott in his motion, affidavits, exhibits and reply, and ruled against Scott as a matter of law based upon *Native Village of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1988). In order to address this issue that the State has raised. Scott requested a court copy of the tape from the proceeding and has enclosed this copy with his Reply brief as Appendix A.

A transcription of the dialogue that occurred at the proceeding on October 2, 1992 between the Honorable District Court Judge Charles Pengilly, Attorney Sheri (Donaldson) Hazeltine for Jeffery Scott, and Assistant District Attorney Jeff O'Bryant follows at Tape 4FA3-1549, log 2228 – 2565 (Appendix A). The discussion that follows occurred at the beginning of the evidentiary hearing, and concerned the Scott's motion to dismiss based upon lack of State jurisdiction, the subject of this Petition. (Scott had also filed four other motions, none of which are the subject of this Petition.) No testimony from any witnesses had been presented yet, and this discussion followed:

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[2] *Cohen v. United States; State ex rel Nepstad v. Danielson; United States v. Sanga.*

Judge Pengilly: "I don't see any way to reconcile your position with *Stevens Village,* do you?"

Miss Donaldson: "Your Honor, this court is not bound by *Stevens.*"

Judge Pengilly: "We have a fundamental disagreement then. I think that Alaska Supreme Court is controlling authority, and that I don't have the discretion to deviate from holding in *Stevens Village.* To the extent that it conflicts with federal law, um, federal law that is short of the United States Supreme Court, I'm bound by the Alaska Supreme Court decisions rather than the Ninth Circuit decisions (inaudible). What I'd suggest we do is, is simply consider your statement of facts in that motion as being an offer of proof. And simply assume that all of those assertions are true for purposes of this motion, and, uh, even on those assumptions I think *Stevens Village* is controlling and compels me to rule against you on that issue. I don't know how you could make a better record, than to simply assume all those assertions are true. But if you want to go ahead."

Miss Donaldson: "Well, no, that's fine, your Honor, um, we did ask, I did call the State the other day and ask if he would stipulate to the facts contained in my motion and affidavits because we do intent to appeal, if we do lose on that, but, um, we are concerned about making a good record. I think this is sufficient at this time."

Judge Pengilly: "Mr. O'Bryant, any objection from the State?"

Mr. O'Bryant: "No your Honor, that's fine."

Judge Pengilly: "Okay."

Mr. O'Bryant: "I just ask leave, um . . . I know this court doesn't want this five-motion hearing to be a day long event."

Judge Pengilly: "I got all morning to reserve, it can at least be a morning-long event."

Mr. O'Bryant: "Um, I guess I would like leave of the court, at some point in time, to possibly supplement the record, uh, with respect to that issue. I'm not sure exactly how. But I'm not uh, I guess I'm willing to stipulate that what's there is there, and it can be part of the record. Without having people come in and testify. With respect to everybody but the defendant. I mean, there's an allegation of this is where it took place. Well, I think we should hear from the defendant on that. Um . . . but if, in the course of the process of the appellate procedure, pre-appellate procedure, it

becomes evident that there's additional facts that are germane to the State's, um, position, as far as this court having jurisdiction, I'd like an opportunity uh, to be able to come back here and supplement the record. I know I'm not saying this very well . . . "

Judge Pengilly: "I don't even understand what you're requesting."

Mr. O'Bryant: "Um. I guess at this time I'm not prepared to rebut that issue. I don't have any contra evidence, if you will, other than, the state of the law, as the judge has indicated, as you have indicated. Factually, though, I might want to put on some additional facts, uh, to, if you will, or counter facts."

Judge Pengilly: "The thing is, I'm not making any factual findings at all, and I don't think its necessary here. My position is that, as a matter of law, even assuming that everything the defense has presented is accurate and all those factual assertions are true, *Stevens Village* compels a ruling against them. So, I think in the absence of any fact-finding by this court on this issue, there's not any need for you to supplement the record. So and unless and until I get reversed at which time we would have to have a full-blown evidentiary hearing."

Mr. O'Bryant: "Okay. I'll just do this. My concern is, for somebody to to determine whether this court is correct, they're gonna look at the record that's here. And the only thing on the record is the facts presented by the Defense through affidavit. Uh, and I haven't, I'm not saying, I'm basically willing to stipulate to those facts."

Judge Pengilly: "I'm not asking you to stipulate."

Mr. O'Bryant: "Oh, okay, alright."

Judge Pengilly: "Yeah, you know, the point I need to make here is that no factual conclusions are being made at all. You're not being understood to have stipulated to anything. And I'm resisting your suggestion that I should leave evidence open in this case because then they're gonna want to present responsive evidence to whatever you present and I'd rather avoid that sort of a situation."

Mr. O'Bryant: "Okay. Just as long as, I'm not, the State's not bound."

Judge Pengilly: "No. No, let's be clear. There's no stipulation here. In fact, there is no finding of fact of any kind."

Mr. O'Bryant: "Okay. Purely legal ruling. Alright. Thank you."

Miss Donaldson: "Your honor, how can we make a record then if there's no record?

Judge Pengilly: "There is a record. The record is that, every factual assertion that's contained in your documents is being assumed, for purposes of this hearing, to be true. And my ruling is, even on that assumption, the laws is against you. You know, I'm not making a finding that all those statements are true, it's a conditional finding. Even if they're true, you still lose. Okay? So, you know, as I said before, I think that's the best of all possible records from your point of view, but, uh, in any event, I hope that much is clear and we can move on to the other motions.

Miss Donaldson, have you got any preference as to how we're gonna proceed from here? There are still four left."

Miss Donaldson: "I would just suggest that we just get started with the testimony of the trooper."

Testimony was then taken from the trooper, Mr. Scott, and a witness of Mr. Scott's (Oscar Jimmie) in connection with the other four motions. Also, at the hearing, Mr. Scott provided extensive testimony and a map pointing out where the moose was shot, contrary to the State's claim.

It is clear from the trial court's comments at the evidentiary hearing that his ruling was purely legal, and that he was not making any factual findings. The court even stated that "so and unless and until I get reversed at which time we would have to have a full-blown evidentiary hearing."

Also, the State has provided a very incomplete copy of Scott's motion to dismiss attached as appendices to its Opposition to the Petition for Certiorari. (*See* State's Appendix A2-A13 in the Brief in Opposition to the Petition for Certiorari). The State left out sixteen (16) pages that included a copy of the summones (Exhibit A of Scott's Motion to Dismiss), the criminal complaint (Exhibit B), the police report (Exhibit C), a transcript of the interrogation of Scott by troopers (Exhibit D), a map showing where the moose was shot on Northway Native Incorporated land (Exhibit E), a copy of the ANSCA Interim Conveyance of the property to Northway Natives Inc. (Exhibit F & G). For clarification, Scott has attached complete copies of his Motion to Dismiss, the State's Opposition to the Motion, and Scott's Reply in the Appendix. (*See* Appendix B, C, & D of this Reply).

Contrary to the State's argument that no facts were presented to the trial court concerning the Native Village of Northway's status as an Indian tribe, Scott presented this evidence in his Motion to Dismiss, his Reply, and in Affidavits from Reva Shircel, Don Shircel, and Al Ketzler, Sr. He was also prepared to present this evidence in the form of witnesses at the evidentiary hearing.

All of the above points to the Alaska Supreme Court's decision in *Native Village of Stevens* and in this case that no factual inquiry is required to determine whether an Alaska Native village has tribal status. In *Native Village of Stevens v. A.M.P.*, 757 P.2d 32, 40 (Alaska 1988), the court inexplicably finds that the power of local government (tribal sovereignty) cannot be extended to the Native village because it is not a "reservation". This conclusion flies in the face of federal Indian law which accords tribal sovereign powers to an Indian tribe in Indian Country, and which states that these powers are not extinguished or terminated unless there is a clear Congressional intent to do so. A reservation is clearly only one type of "Indian Country".

The Alaska Supreme Court's legal ruling is in direct conflict with the Ninth Circuit's ruling in *Native Village of Venetie* which holds that Alaska Native village sovereignty exists unless and until affirmatively divested by Congress. According to the Ninth Circuit, an express factual finding must be made to determine whether a village is an Indian tribe which is the modern-day successor to a sovereign historical band of Natives. These conflicting decisions are only resolvable by this Court.

III. The Native Village of Northway Retains its Inherent Tribal Sovereign Authority to Manage Hunting in Indian Country.

The State also claims that as a purely legal matter Congress divested the village of whatever sovereign control over game resources it might have had. *See* Opposition to Petition for Certiorari, page 5 and 6. It cites as authority Section 4(b) of ANSCA.

Scott does not disagree that ANSCA extinguished aboriginal hunting rights on land where Indian property titles were extinguished. But it is Scott's position that ANSCA did not extinguish aboriginal hunting rights on Native corporation lands.[3]

The State also cites several cases as support for its position that ANSCA extinguished aboriginal hunting rights in Alaska. These cases can be distinguished from Scott's case. This Court in *Amoco Production Co. v. Gambell*, 480 U.S. 531, 94 L.Ed.2d 542, 562, 107 S.Ct. 1396 (1987) held that it did not decide the scope of ANSCA Sec. 4(b), but instead reversed the Ninth Circuit on other grounds. *United States v. Atlantic Richfield*, 612 F.2d 1132 (9th Cir. 1980) involved trespass claims on Native land, and did not concern the extinguishment of fishing rights of Alaska Natives on Native-owned lands. In *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 20 L.Ed.2d 697, 703, 88 S.Ct. 1705 (1968) the Court declined to

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[3] *See Hackla v. Atxam, Corp.*, 753 P.2d 1144, 1147 (Alaska 1988) (ambiguities in ANSCA, as in other federal statutes for the benefit of the Indians, are to be construed in favor of the Indians.) Tribal status and governmental powers survive the termination of a reservation unless clearly and unequivocally extinguished by Congress. *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 353, (1941); *Decoteau v. District County Court*, 420 U.S. 425, 442-44 (1975); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 590 F.2d 768, 776-77 (9th Cir.), *cert. den.* 444 U.S. 826 (1979). Federal courts have ruled that this principle applies equally to ANSCA villages. *See Chilkat Indian Village v. Johnson*, No. J84-024 Civ. (D. Alaska, Oct. 9, 1990) (if Chilkat had governmental power under its status as a reservation ANSCA did nothing to extinguish those powers); *Native Village of Tyonek v. Puckett*, 890 F.2d 1054 (9th Cir. 1989) (ANSCA did not abrogate Tyonek's tribal sovereign immunity); *Blatchford v. Native Village of Noatak and Circle Village*, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (ANSCA constitutes Congressional recognition of Native villages as Indian tribes).

The federal government's special relationship with Alaska Natives to facilitate the goals of self-determination is evidenced by the fact that ANSCA villages have been recognized in virtually all modern Indian legislation enacted since 1971. *See* 25 U.S.C. Sec. 450a(b), 450b(e), 25 U.S.C. Sec. 1901 *et seq.*, 25 U.S.C. Sec. 1451, 1452(c), 31 U.S.C. Sec. 7102, 26 U.S.C. Sec. 7701(40), 7871.

Although all Indian reserves except one in Alaska were revoked under ANSCA, no attempt was made under the statute to limit the authority of the Native villages, either the many villages that had organized pursuant to the IRA or those that had governed according to their inherent tribal authority. *Getches & Wilkinson*, Federal Indian Law, pg. 778 (West 1986).

hold that the Termination Act was a backhanded way of abrogating the hunting and fishing rights of the Indians. The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress. *Id.*

Also, as Scott has previously stated, there is no law enforcement vacuum at present on these Indian Country lands because tribal law currently governs. The State erroneously contends that the tribe has no tribal law governing these lands. Currently the State is interfering with the tribe's regulation of hunting on its lands and Scott has repeatedly argued this at the lower court levels, contrary to the State's assertion that he has not argued this. *See Scott's Motion to Dismiss for Lack of State Jurisdiction,* Appendix B and *Reply,* Appendix D.

CONCLUSION

It is clear that Scott has presented ample basis upon which this Court should exercise its power of discretionary review. The direct and continuing conflict in law between the Alaska Supreme Court and the Ninth Circuit are only resolvable by this Court. This matter will continue to arise as long as the Alaska State Courts hold that Alaska Native villages are not Indian tribes as a matter of law.

For the foregoing reasons, the Alaska Supreme Court's decision should be reviewed and reversed by this Court. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 15, 1994

APPENDIX A

(This is an original tape that was lodged with the Court.)